



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

NOV 04 2004

Honorable George Elton Howell  
President  
Pawnee Nation of Oklahoma  
P.O. Box 470  
Pawnee, OK 74058

Dear President Howell:

The Environmental Protection Agency (EPA) has completed its review of the Pawnee Nation of Oklahoma's request for Clean Water Act (CWA) §303(c) and §401 program authorization and is approving that request as it pertains to the majority of tribal trust lands. The request for program authorization was submitted for EPA's approval by letters dated February 18, 1998 and March 30, 1997 (actually sent March 30, 1998), and received by EPA on March 2, 1998 and April 6, 1998.

Complete documentation of our review of the request for program authorization can be found in the enclosure titled *Decision Document: Partial Approval of Pawnee Nation of Oklahoma Application for Program Authorization under §303(c) and §401 of the Clean Water Act*. As part of the review, EPA was required to request comments from other governmental entities located contiguous to the Pawnee Nation on the Tribe's authority to regulate water quality on tribal lands. A response to comments is included in the docket for this decision.

In the preamble to the final amendments to the Water Quality Standards Regulation dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that the Agency "believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation." 56 Fed. Reg. at 64881. This position is based on the limitation in CWA §518(e) to waters "otherwise within the borders of an Indian reservation" and the definition of "Indian tribe" contained in CWA §518(h)(2). CWA §518(h)(2) defines an Indian Tribe as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." The term "Federal Indian reservation" is defined in CWA §518(h)(1) as:

[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

This is the same definition used to define the reservation component of "Indian country" in 18 U.S.C. 1151(a).

Based on the language and contents of the program authorization request, EPA assumes that the Pawnee Nation's request for the CWA §303(c) and §401 programs does not include an assertion of a formal reservation. However, in the 1991 preamble to the Water Quality Standards Regulation, EPA noted that the Agency considers trust lands formally set apart for the use of Indians - such as the tribal trust lands over which the Pawnee Nation seeks program authorization - to be "within a reservation"

for purposes of §518(e)(2), even if they have not been formally designated as “reservations.” 56 Fed. Reg. at 64881 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991)). EPA and the courts have treated tribal trust lands outside the boundaries of formal reservations as “reservations” under EPA regulations and 18 U.S.C. 1151(a)(the reservation component of “Indian country”). See Arizona Pub. Service Co. v. U.S. Environmental Protection Agency, 211 F.3d 1280, 1294 (D.C. Cir. 2000), cert. denied 532 U.S. 970 (2001); HRI, Inc. v. EPA, 198 F.3d 1224, 1249-54 (10<sup>th</sup> Cir. 2000). Therefore, Tribes without formal reservations may receive program authorization under the CWA for tribal trust lands.

In addition to tribal trust lands, the application from the Pawnee Nation seeks program authorization for member allotments. EPA is not approving the portion of the application for these allotments because the Pawnee Nation has not demonstrated as a legal matter that these allotments fall within the scope of CWA §518(e).

Furthermore, the Pawnee Nation seeks program authorization over certain land at Chilocco, Oklahoma, known as the Chilocco Campus. The Pawnee Nation has an undivided interest in the Chilocco Campus, along with four other Tribes in the area. These Tribes all have the same rights and no single Tribe has authority over the jointly held lands. Because the Pawnee Nation has not demonstrated adequate authority for CWA program authorization over that area, EPA is not approving treatment in the same manner as a State for the jointly held lands. The Pawnee Nation’s tribal trust lands south of the Chilocco Campus are included in EPA’s approval.

Therefore, based on our review, EPA approves the Pawnee Nation’s program authorization request under CWA §303(c) and §401 for tribal trust lands other than the jointly held Chilocco Campus. The partial approval of the Pawnee Nation’s original request does not preclude the Tribe’s regulation of water quality on allotments under its own laws.

EPA looks forward to working with the Pawnee Nation of Oklahoma in implementing its water quality programs. We are prepared to help facilitate appropriate discussions with the Pawnee Nation and the State of Oklahoma towards the establishment of tribal and state standards that are mutually compatible and supportive wherever possible.

If you have any questions or concerns, please contact me at (214) 665-2100 or the Region 6 Water Quality Protection Division at (214) 665-7101.

Sincerely yours,



Richard E. Greene  
Regional Administrator

Enclosure

cc: Monty Matlock, Pawnee Nation of Oklahoma - Dept. of Environmental Conservation & Safety

DECISION DOCUMENT:

PARTIAL APPROVAL OF PAWNEE NATION OF OKLAHOMA  
APPLICATION FOR PROGRAM AUTHORIZATION  
UNDER §303(c) AND §401 OF THE CLEAN WATER ACT

U.S. EPA REGION 6  
October 2004

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## I. Introduction

### A. Purpose:

The purpose of the Decision Document is to provide the basis and supporting information for the Environmental Protection Agency's (EPA) partial approval of the application from the Pawnee Nation of Oklahoma to administer §303(c) (Water Quality Standards program) of the Clean Water Act (CWA). EPA's regulation found at 40 CFR §131.4(c) states:

*Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act Section 401.*

EPA's approval applies to the administration of the water quality standards and §401 certification programs for waters that lie fully or partially within the exterior borders of the Pawnee Nation's tribal trust lands. EPA is not approving the portion of the application for member allotments because the Pawnee Nation has not demonstrated as a legal matter that these allotments fall within the scope of CWA §518(e).

Furthermore, the Pawnee Nation seeks program authorization over certain land at Chilocco, Oklahoma known as the Chilocco Campus. The Pawnee Nation has an undivided interest in the Chilocco Campus, along with four other Tribes in the area. These Tribes all have the same rights and no single Tribe has authority over the jointly held lands. Because the Pawnee Nation has not demonstrated adequate authority for CWA program authorization over that area, EPA is not approving treatment in the same manner as a state (TAS) for the jointly held lands. The Pawnee Nation's tribal trust lands south of the Chilocco Campus are included in EPA's approval.

In conclusion, the waters and associated tribal trust land parcels for which TAS is being approved are as follows:

- 366.03 acres in the NE quarter (all parts), NW quarter (NE and SE parts), SW quarter (NE and SE parts), and SE quarter (all parts) of Section 32, Township 22N, Range 5E Indian Meridian (Pawnee County) - Black Bear Creek and unnamed tributary (sometimes called Possum Creek);
- 320 acres in the NW quarter (all parts) and SW quarter (all parts) of Section 33, Township 22N, Range 5E Indian Meridian (Pawnee County) - Black Bear Creek and unnamed tributary;

- 10 acres in the SW quarter (SE part) of Section 16, Township 19N, Range 5E Indian Meridian (Payne County) - no known surface waters;
- 10 acres in the SW quarter (SW part) of Section 18, Township 21N, Range 5E Indian Meridian (Pawnee County) - no known surface waters;
- 10 acres in the SW quarter (SE part) of Section 20, Township 22N, Range 5E Indian Meridian (Pawnee County) - no known surface waters;
- 10 acres in the NE quarter (SW part) of Section 32, Township 22N, Range 4E Indian Meridian (Pawnee County) - no known surface waters;
- 240 acres located in the NE quarter (NE and SE parts) and the SE quarter (all parts) of Section 22, Township 29N, Range 2E Indian Meridian (Kay County) - Chilocco Creek and three unnamed tributaries to Chilocco Creek;
- 180 acres located in the SW quarter (all parts), SE quarter (SW parts), and NW quarter (SW part) of Section 23, Township 29N, Range 2E Indian Meridian (Kay County) - unnamed tributary to Chilocco Creek;
- 403.56 acres in the NE quarter (NW and SW part), NW quarter (all parts), SW quarter (all parts), and SE quarter (NW and SW parts) of Section 26, Township 29N, Range 2E Indian Meridian (Kay County) - three unnamed tributaries to Chilocco Creek.

This TAS approval covers riparian wetlands associated with Black Bear Creek, Chilocco Creek and the unnamed tributaries on any of the identified tribal trust lands.

**B. Application:**

The Pawnee Nation's application for program authorization under CWA §303 and §401 consists of two documents:

- the Tribe's application to administer the CWA §303(c) and §401 programs, letter from Marshall Gover, President, Pawnee Tribe of Oklahoma, dated February 13, 1998, received by EPA on March 2, 1998.
- supplemental information to the application, letter from Marshall Gover, President of the Pawnee Tribe of Oklahoma, dated March 30, 1997 (should be 1998), received by EPA on April 6, 1998.

**C. Chronology of Events:**

February 13, 1998 - Application for program authorization under CWA §§303 and 401.

March 30, 1997[8] - Supplemental information for request for program authorization under CWA §§303 and 401.

April 29, 1998 - Letters to "appropriate governmental entities," from William B. Hathaway, EPA Water Quality Protection Division Director. Letters and copies of the two maps in the Pawnee Nation's application were sent to the following entities.

Cherokee Nation of Oklahoma	Office of the Secretary of Environment
Kaw Nation	Oklahoma Water Resources Board
Muscogee (Creek) Nation	Oklahoma Dept. of Agriculture
Osage Tribe of Indians	Oklahoma Dept. of Environmental Quality
Otoe-Missouria Tribe of Oklahoma	Oklahoma State Dept. of Health
Ponca Tribe of Indians of Oklahoma	Oklahoma Dept. of Mines
Tonkawa Tribe of Indians	Oklahoma Dept. of Transportation
Bureau of Indian Affairs -Anadarko Office	Oklahoma Dept. of Wildlife Conservation
Bureau of Indian Affairs - Pawnee Agency	Oklahoma Conservation Commission
Indian Health Service	Oklahoma Corporation Commission
Federal Highway Administration	Oklahoma Indian Affairs Commission
Natural Resources Conservation Service	Oklahoma Tax Commission
U.S. Fish and Wildlife Service	Oklahoma Geological Survey
U.S. Geological Survey	Office of the Governor of Oklahoma

Public notices were published in the *Pawnee Chief* on April 29, 1998, and in the *Daily Oklahoman* and the *Tulsa World* on May 2, 1998, so that local governments and citizens could comment. Consistent with the preamble to EPA's water quality standards regulation (see 56 Fed. Reg. 64876-64896), the public notices requested that comments from local governments and citizens be submitted to the appropriate state agency. In this case, the Oklahoma Water Resources Board was the appropriate state agency to compile comments from local entities and the public. EPA mailed an announcement, the public notice and two maps of the Pawnee Nation's trust lands to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee (attn: Public Works Dept.) and the New Life Center (located on Chilocco campus).

May 8, 1998 - Indian Health Service response from Randy E. Grinnell, Acting Area Director.

May 8, 1998 - Natural Resources Conservation Service response from Eddie L. Kephart, Assistant State Conservationist.

May 14, 1998 - Oklahoma Corporation Commission response from Jay Edwards, General Administrator.



May 21, 1998 - Bureau of Indian Affairs (BIA) - Pawnee Agency response from Julia M. Langan, Superintendent. Map of "Restricted Indian Land Pawnee Reservation" (October 1991) included with response.

May 28, 1998 - Kaw Nation response from Wanda Stone, Chairperson; Walter I. Hare, Jr. Administrative Services Director and Timothy F. Kennedy.

May 28, 1998 - BIA -Anadarko Area Office response from Bruce Maytubby, Chief of Trust Services Branch. Information from *Bureau of Indian Affairs Land Index Report* database also included (171 pp., dated May 4, 1998).

May 29, 1998 - Oklahoma Conservation Commission response from Mike Thralls, Director.

June 2, 1998 - U.S. Fish and Wildlife Service response from Jerry Brabander, Field Supervisor.

June 10, 1998 - Personal communication at Inter-Tribal Environmental Council conference. Derek Smithee, Oklahoma Water Resources Board (OWRB) to Diane Evans, EPA. Discussion confirmed that the Oklahoma Water Resources Board did not receive any comments in response to the public notices published in the *Pawnee Chief*, the *Daily Oklahoman*, and the *Tulsa World*.

December 2, 1998 - Letter to Bruce Maytubby, Chief - BIA Anadarko Office Trust Services Branch, from Richard Hoppers, Chief - EPA Region 6 Ecosystems Protection Branch. Copies sent to Julia Langdon, Superintendent - BIA Pawnee Agency; Marshall Gover, President - Pawnee Tribe of Oklahoma; and, Monty Matlock, Director - Pawnee Tribe Dept. of Environmental Conservation and Safety.

March 2, 1999 - Letter from Debi Koebrick, Manager - BIA - Anadarko Area Office Land Titles & Records to Richard G. Hoppers, Chief - EPA Region 6 Ecosystems Protection Branch.

May 4, 2004 - Letter from William Honker, Acting Deputy Director, Region 6 Water Quality Protection Division to Honorable George Elton Howell, President of the Pawnee Nation of Oklahoma approving the Pawnee Nation's application for TAS for purposes of §303 and §401 of the CWA.

June 3, 2004 - Letter from Senator James Inhofe, Chairman of the Senate Committee on Environment and Public Works to Richard Greene, Regional Administrator, Region 6, U.S. EPA. Included June 1, 2004 letter from Senator Inhofe to David Walker, Comptroller General of the United States.



June 3, 2004 - Letter from Miguel Flores, Director, Region 6 Water Quality Protection Division to Honorable George Elton Howell, President of the Pawnee Nation of Oklahoma, rescinding the May 4, 2004, TAS approval letter.

July 16, 2004- Letters to “appropriate governmental entities,” from William Honker, Acting Deputy Director, Region 6 Water Quality Protection Division. Letters and copies of the two maps in the Pawnee Nation’s application were sent to the following entities:

Cherokee Nation of Oklahoma	Office of the Secretary of Environment
Kaw Nation	Oklahoma Water Resources Board
Muscogee (Creek) Nation	Oklahoma Dept. of Agriculture
Osage Tribe of Indians	Oklahoma Dept. of Environmental Quality
Otoe-Missouria Tribe of Oklahoma	Oklahoma State Dept. of Health
Ponca Tribe of Indians of Oklahoma	Oklahoma Dept. of Mines
Tonkawa Tribe of Indians	Oklahoma Dept. of Transportation
Bureau of Indian Affairs -Anadarko Office	Oklahoma Dept. of Wildlife Conservation
Bureau of Indian Affairs - Pawnee Agency	Oklahoma Conservation Commission
Indian Health Service	Oklahoma Corporation Commission
Federal Highway Administration	Oklahoma Indian Affairs Commission
Natural Resources Conservation Service	Oklahoma Tax Commission
U.S. Fish and Wildlife Service	Oklahoma Geological Survey
U.S. Geological Survey	Office of the Governor of Oklahoma
Bureau of Land Management	
U.S. Army Corps of Engineers	

Public notices were published in the *Daily Oklahoman* and the *Tulsa World* on July 14, 2004 and the *Pawnee Chief* on July 21, 2004, so that local governments and citizens could comment. As discussed above, the public notices instructed that comments from local governments and citizens be submitted to OWRB. The notice requested comments by August 16, 2004. EPA mailed an announcement, the public notice and two maps of the Pawnee Nation’s trust lands to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee (attn: Public Works Dept.) and the New Life Center (formerly located on Chilocco campus).

July 21, 2004 - Oklahoma Corporation Commission response from Ben Jackson, General Counsel.

August 13, 2004 - Indian Health Service (IHS) response from Dale Keel, Acting Area Director.

August 13, 2004 - Oklahoma Office of the Secretary of Environment (OSE) response from Miles Tolbert, Secretary of the Environment.

August 13, 2004 - Oklahoma Water Resources Board response (transmitted by OSE letter) from Duane A. Smith, Executive Director.

August 16, 2004 - Oklahoma Department of Environmental Quality (transmitted by OSE letter) from Steven A. Thompson, Executive Director.

August 17, 2004 - Oklahoma Department of Mines response from Tekleab Tsegay, Chief, Technical Services.

August 20, 2004 - Cherokee Nation response from Chadwick Smith, Principal Chief.

August 20, 2004 - Muscogee (Creek) Nation response from A.D. Ellis, Principal Chief.

August 20, 2004 - St. Regis Mohawk Tribe response from Chief Margaret Terrance, Chief Barbara Lazore, and Chief James Ransom.

Undated (received August 23, 2004) - Eastern Shawnee Tribe of Oklahoma response from Charles Enyart, Chief.

August 23, 2004 - Bureau of Indian Affairs response from Michael R. Smith, Regional Director.

Undated (received September 1, 2004) - Seneca-Cayuga Tribe of Oklahoma response from LeRoy Howard, Chief.

August 24, 2004 - Oklahoma Water Resources Board transmittal of public comments from Derek Smithee, including the following:

July 21, 2004 - Environmental Federation of Oklahoma, Inc. letter from James R. Barnett, President and General Counsel

August 5, 2004 - Oklahoma Municipal League, Inc. letter from Danny George, Executive Director

August 10, 2004 - Oklahoma Independent Petroleum Association letter from Angie Burckhalter, Director of Regulatory Affairs

August 16, 2004 - Oklahoma Farm Bureau & Affiliated Companies letter from Marla R. Peek, Director of Regulatory Affairs

## II. Requirements for Tribal Program Authorization under Clean Water Act §303(c) and §401

Under CWA §518(e) and EPA's implementing regulation at 40 CFR §131.8, four requirements must be satisfied before EPA can approve a Tribe's application to administer the water quality standards and §401 certification programs. These are: (A) the Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3(k) and (l)<sup>1</sup>; (B) the Indian Tribe has a governing body carrying out substantial governmental duties and powers; (C) the water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are held by the Indian Tribe, held by the United States in trust for Indians, held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and, (D) the Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

### A. Federal Recognition:

The Pawnee Nation of Oklahoma is a federally-recognized Tribe (see 67 Fed. Reg. 46327-46333, July 12, 2002). The Tribe is made up of a confederation of the Chaui, Kitkehahke, Petahauerate and Skeedee bands. The Pawnee Nation adopted a Tribal Constitution under the Oklahoma Indian Welfare Act (25 U.S.C. 501 *et seq.*), which has been approved by the BIA.

In addition, to meet the definition of "Indian tribe," there must be the equivalent of a reservation over which the Tribe has authority.<sup>2</sup> The Pawnee Nation's 1857 reservation was sold in 1876 and the Tribe bought a little over 283,000 acres in north central Oklahoma. By 1893, a portion of this land had been allotted in 160 acre tracts to 821 tribal members. The remaining 169,000 acres were opened for

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<sup>1</sup> 40 CFR §131.3(l) defines the term "Indian Tribe" as "any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 CFR §131.3(k) defines Federal Indian reservation as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." In order to be eligible for TAS, a Tribe must meet the definition of Indian Tribe, which requires a "reservation." EPA interprets the term "reservation" to include lands held in trust for a Tribe, even if such lands have not been formally designated as a reservation. See 56 Fed. Reg. 64876-896 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905 (1991)).

<sup>2</sup> See §518(e)(2) of the CWA, 33 U.S.C. §1377(e)(2).

non-Indian settlement. While the restrictions have lapsed on some of these tracts, many were placed in trust with the BIA for the Tribe. The lands which were placed in trust for the benefit of the Tribe are considered reservations under EPA's regulations and existing case law.<sup>3</sup> Therefore, the Pawnee Nation meets the criteria of a federally-recognized Tribe exercising authority over a reservation.

**B. Substantial Governmental Duties and Powers:**

The Pawnee Nation has a governing body with substantial governmental duties and powers. Article II(d) of the Pawnee Constitution establishes the Pawnee Business Council and delineates the jurisdiction and powers of the Council. Article II(d)(i) asserts tribal jurisdiction over all water and air within Indian country "consistent with applicable federal law." Paragraph (ii) establishes a Law and Order and Judicial System "to protect the peace, safety, health and welfare" of the members of the Tribe.

Pursuant to this authority, the Business Council has adopted its own environmental laws. For example, Title VI, section 566 of the Pawnee Law and Order Code makes it unlawful to pollute any water over which the Tribe has authority. Article II(d)(iv) states that the Constitution, bylaws and laws and ordinances passed by the Pawnee Business Council are the supreme law of the Pawnee Nation. The Pawnee Constitution also recognizes the Nasharo Council. This Council, made up of two members from each of the four original bands, has authority to review actions of the Business Council that relate to membership and treaty rights, including treaty rights that pertain to water resources. The Pawnee Nation has implemented a CWA grant since 1996. In addition to the development of water quality standards, the Pawnee Nation is implementing a comprehensive monitoring and assessment program for surface waters; has drafted a Nonpoint Source Assessment and Management Plan; has conducted an environmental needs assessment; and, has created an environmental learning center for the community. Therefore, the Pawnee Nation has demonstrated that it has a governing body with substantial governmental duties and powers.

**C. Jurisdiction over "Waters within the Borders" of Reservation Lands:**

In the preamble to the Final Rule, "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that the Agency "believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation" (56 Fed. Reg. at 64881). This position is based on the limitation in CWA §518(e) to waters "otherwise within

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<sup>3</sup> See footnote 1, supra.

the borders of an Indian reservation” and the definition of “Indian tribe” contained in the CWA §518(h)(2). CWA §518(h)(2) defines an Indian tribe as “any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” The term “Federal Indian reservation” is defined in CWA §518(h)(1) as:

[All] land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

This is the same definition used to define the reservation component of “Indian country” in 18 U.S.C. 1151(a).

In the 1991 preamble, EPA noted that the Agency considers trust lands formally set apart for the use of Indians to be “within a reservation” for purposes of §518(e)(2), even if they have not been formally designated as “reservations.” 56 Fed. Reg. at 64881 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991)). EPA and the courts have treated tribal trust lands outside the boundaries of formal reservations as “reservations” under EPA regulations and 18 U.S.C. 1151(a)(the reservation component of “Indian country”). See Arizona Pub. Service Co. v. U.S. Environmental Protection Agency, 211 F.3d 1280, 1294 (D.C. Cir. 2000), cert. denied 532 U.S. 970 (2001); HRI, Inc. v. EPA, 198 F.3d 1224, 1249-54 (10<sup>th</sup> Cir. 2000). Accordingly, Tribes without formal reservations may receive program authorization under the CWA for tribal trust lands.

The request from the Pawnee Nation for the water quality standards program discusses the Tribe’s land base in Section I of the Narrative Statement. The Tribe does not discuss whether the 1876 reservation remains in existence, but does reference the 1893 allotment. Based on the submittal, EPA assumes that the Pawnee Nation’s request for the CWA §303(c) and §401 programs does not include an assertion of a formal reservation. The application seeks program authorization for certain tribal trust lands and member allotments.

By treaty with the United States, the Pawnee Nation held a sizeable reservation in what is now Nebraska and Kansas. Under treaties of 1833, 1843, and 1857, the Pawnee Nation ceded their land to the United States except for a 30-mile by 10-mile reservation in Nebraska. That reservation was sold in 1876 and the Tribe bought a little over 283,000 acres in north central Oklahoma. By 1893, a portion of this land had been allotted in 160 acre tracts to 821 tribal members. The member allotments comprise a portion of the area for which the Pawnee Nation seeks authorization for CWA §303(c) and §401. The remaining 169,000 acres



were opened for non-Indian settlement. While the restrictions have lapsed on some of these tracts, many were placed in trust with BIA for the Tribe.

The Pawnee Constitution allows the Business Council to exercise authority to protect the water resources over which the Tribe has jurisdiction. The CWA requires the Tribe to demonstrate that the functions to be exercised pertain to the management and protection of water resources held by the Tribe, held by the United States in trust for Indians, held by a member of a Tribe if there is a restriction on alienation, or otherwise within the borders of an Indian reservation (§518(e)(2), 33 U.S.C. §1377(e)(2)). The submittal from the Pawnee Nation includes a map of trust lands over which the Tribe asserts jurisdiction. The Tribe has submitted a copy of the Tribal Constitution and the Pawnee Tribe of Oklahoma Law and Order Code asserting civil jurisdiction over these areas. The Pawnee Nation's tribal trust lands which are included in the areas where the Tribe has shown authority to receive this program authorization under the CWA are listed below:

- 366.03 acres in the NE quarter (all parts), NW quarter (NE and SE parts), SW quarter (NE and SE parts), and SE quarter (all parts) of Section 32, Township 22N, Range 5E Indian Meridian (Pawnee County)
- 320 acres in the NW quarter (all parts) and SW quarter (all parts) of Section 33, Township 22N, Range 5E Indian Meridian (Pawnee County)
- 10 acres in the SW quarter (SE part) of Section 16, Township 19N, Range 5E Indian Meridian (Payne County)
- 10 acres in the SW quarter (SW part) of Section 18, Township 21N, Range 5E Indian Meridian (Pawnee County)
- 10 acres in the SW quarter (SE part) of Section 20, Township 22N, Range 5E Indian Meridian (Pawnee County)
- 10 acres in the NE quarter (SW part) of Section 32, Township 22N, Range 4E Indian Meridian (Pawnee County)
- 240 acres located in the NE quarter (NE and SE parts) and the SE quarter (all parts) of Section 22, Township 29N, Range 2E Indian Meridian (Kay County)
- 180 acres located in the SW quarter (all parts), SE quarter (SW part), and NW quarter (SW part) of Section 23, Township 29N, Range 2E Indian Meridian (Kay County)
- 403.56 acres in the NE quarter (NW and SW parts), NW quarter (all parts), SW quarter (all parts), and SE quarter (NW and SW parts) of Section 26, Township 29N, Range 2E Indian Meridian (Kay County)

Therefore, the Pawnee Nation has identified water resources on tribal trust lands (i.e., "reservation" lands), and has cited to the Tribal Constitution and Code asserting jurisdiction over these lands. EPA finds that under well-established

principles of Federal Indian law, the Nation retains attributes of sovereignty over both its members and its territory and has authority to establish water quality standards on these tribal trust lands. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

The submittal from the Pawnee Nation also includes areas where the Tribe has not demonstrated that it has met the requirements in CWA §518(e) and EPA's implementing regulations. First, the Pawnee Nation seeks to receive program authorization over member allotments.

The preamble to the final Water Quality Standards Regulation discusses several comments received on the term "reservation" in CWA §518:

Comments received suggested that EPA should alter its reading of this provision to allow Tribes to qualify for treatment as a State over all water resources within its jurisdiction. These comments asserted that limiting Tribes to water resources within the reservation would prevent a Tribe from obtaining treatment as a State status over water resources outside the reservation to which it has legitimate jurisdictional claim. Examples cited included traditional resource areas (known as "usual and accustomed" areas) outside reservation borders, and all lands held in trust for Tribes by the U.S. Government or held by individual Indians that lie outside reservation borders, lands in "Indian Country" (as defined in 18 U.S.C. 1151) that lie outside reservation borders and, in general, all water resources within the territorial jurisdiction of the Tribe that lie outside reservation borders.

\* \* \*

56 Fed. Reg. at 64881

EPA responded:

Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes section 518(e)(2), even if they have not been formally designated as "reservations." Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991). This means it is the status and use of the land that determines if it is to be



considered "within a reservation" rather than the label attached to it. EPA believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation. EPA bases this conclusion, in part, on the definition of "Indian Tribe" found in CWA section 518(h)(2).

Id.

EPA has consistently interpreted the term "reservation" to include tribal trust lands, even if they are not part of a formal reservation, see 63 Fed. Reg. 7254, 7258 (February 12, 1998)(preamble to EPA's Clean Air Act Tribal Authority Rule). However, EPA has not treated allotments outside of formal reservations as within the scope of CWA §518(e), see id., and the Pawnee Nation has not demonstrated as a legal matter that the allotments covered by its application fall within the scope of that section.

Second, there is an area over which the Pawnee Nation has not shown adequate authority for program authorization. That area is known as Chilocco campus. The Pawnee Nation has an undivided interest in that land along with four other Tribes. The five Tribes all have the same rights and no single Tribe has authority over the jointly held lands. The Pawnee Nation has not demonstrated adequate authority for EPA to approve the Tribe for CWA program authorization over that area.

It should be noted that EPA is not today determining the scope of the Tribe's regulatory authority for all purposes. EPA is today finding that the Pawnee Nation has sufficient authority to establish water quality standards under the CWA for the lands held in trust by the United States for the Tribe and to perform certifications under CWA §401. EPA will continue to be responsible for issuance and enforcement of CWA National Pollutant Discharge Elimination System permits for Indian country in Oklahoma, including the Pawnee Nation's tribal trust lands and member allotments. Also, the U.S. Army Corps of Engineers will continue to issue and enforce permits under CWA §404 and the Rivers and Harbors Act for Indian country in Oklahoma.

**D. Capability:**

The Pawnee Nation of Oklahoma has demonstrated that it is reasonably capable of establishing and implementing a water quality standards and §401 certification program in a manner consistent with the terms and purposes of the CWA and applicable regulations. In determining that the Pawnee Nation has the capability to establish and implement an adequate water quality standards and §401 certification program, EPA considered that the Tribe:

1. Has developed and staffed a Department of Environmental Conservation and Safety to carry out the mission of programs such as water quality standards.
2. Has conducted an environmental needs assessment and enacted the Pawnee Tribal Environmental Regulatory Act.
3. Has developed draft water quality standards which include the CWA requirements of identifying and designating beneficial uses for tribal water bodies, identifying water quality criteria to protect those beneficial uses, and a policy on antidegradation.
4. Has developed a water quality monitoring program for assessment of physical, chemical, and biological parameters.
5. Has demonstrated administrative capability with cooperative agreements under CWA §104(b)(3), CWA §106 and the General Assistance Program.

Therefore, the Pawnee Nation has demonstrated capability to implement the water quality standards and § 401 certification programs.

### **III. Response to Comments**

A public comment period was initiated on April 29, 1998 for the purposes of seeking input from the public and appropriate governmental entities. EPA received nine comments during this comment period. A second public comment period was initiated in July 2004. EPA received eleven responses to its request for comments from Indian Tribes and state and federal agencies. The Oklahoma Water Resources Board received four responses to the public notices and forwarded these letters to EPA. All comments were evaluated by EPA's Office of Regional Counsel and Water Quality Protection Division. A summary of significant comments and EPA's response is included in the docket for this action.

### **IV. Conclusion**

EPA has determined that the Pawnee Nation of Oklahoma has met the requirements of 40 CFR §131.8 and CWA §518 and is authorized to implement the CWA §303(c) and §401 programs for the lands identified in Part II.C. of this document. The Pawnee Nation has not provided sufficient information to support approval of TAS for member allotments and certain jointly held lands referred to as the Chilocco Campus. EPA stands ready to assist the Pawnee Nation in the development of its WQS. EPA is also prepared to help facilitate appropriate discussions with the Tribe and the State of Oklahoma towards the establishment of state and tribal standards that are mutually compatible and supportive wherever possible.

**2004 Response to Comments on Pawnee Nation of Oklahoma's  
Application for Program Authorization under Clean Water Act §§303(c) and 401**

The Water Quality Standards Regulations in 40 CFR §131.8 require EPA to notify "appropriate governmental entities" to allow comment on the Tribe's assertion of authority to implement the water quality standards and §401 certification programs. The preamble to the regulation (56 Fed. Reg. 64876-64896) describes governmental entities as "States, Tribes and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State" (TAS). EPA requested comments from government entities on the Pawnee Nation's assertion of authority to implement the water quality standards and §401 certification programs within the boundaries of the Tribe's trust lands.

The preamble to the Water Quality Standards Regulation (56 Fed. Reg. 64876-64896) also states that EPA will make an effort to provide local governments and others an opportunity to comment. EPA placed public notices in the *Pawnee Chief*, the *Daily Oklahoman* and the *Tulsa World* to notify local governments and citizens of the Pawnee Nation's request for program authorization under the Clean Water Act (CWA). EPA and the Pawnee Nation identified local entities that could be affected by the Pawnee Nation's water quality standards. An announcement, the public notice and two maps of the Pawnee Nation's trust lands were mailed to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee and the New Life Center.

The Bureau of Indian Affairs (BIA) provided specific information on the Pawnee Nation's lands. The BIA Pawnee Agency provided a map titled "Restricted Indian Land Pawnee Reservation," dated October 1991. The BIA Anadarko Area Office provided a copy of the Land Index Report for the Pawnee Nation. EPA compared the Land Index Report with the two maps contained in the Pawnee Nation's application and the map provided by the BIA-Pawnee Agency. These three sources of information are consistent for the tribal trust lands identified in the Decision Document.

For member allotments, there were a few discrepancies between the BIA map, the Land Index Report and the map submitted by the Pawnee Nation. EPA requested clarification on the status of specific tracts of land from the BIA Anadarko Area Office, which responded by letter dated March 2, 1999.

Public notices were published in the *Pawnee Chief* on April 29, 1998, and in the *Daily Oklahoman* and the *Tulsa World* on May 2, 1998. The following submitted comments in response to this initial notice:

- Indian Health Service from Randy E. Grinnell, Acting Area Director;
- Natural Resources Conservation Service from Eddie L. Kephart, Assistant State Conservationist;
- Oklahoma Corporation Commission Response from Jay Edwards, General Administrator;

- BIA - Pawnee Agency from Julia M. Langan, Superintendent (map of “Restricted Indian Land Pawnee Reservation” (October 1991) included);
- Kaw Nation from Wanda Stone, Chairperson; Walter I. Hare, Jr. Administrative Services Director and Timothy F. Kennedy;
- BIA -Anadarko Area Office response from Bruce Maytubby, Chief of Trust Services Branch (Information from *Bureau of Indian Affairs Land Index Report* database also included (171 pp., dated May 4, 1998));
- Oklahoma Conservation Commission from Mike Thralls, Director;
- U.S. Fish and Wildlife Service response from Jerry Brabander, Field Supervisor; and,
- Debi Koebrick, Manager - BIA - Anadarko Area Office Land Titles & Records.

A June 10, 1998 discussion at Inter-Tribal Environmental Council conference between Derek Smithee, Oklahoma Water Resources Board (OWRB) and Diane Evans, EPA confirmed that the Oklahoma Water Resources Board did not receive any comments in response to the April and May 1998 public notices published in the *Pawnee Chief*, the *Daily Oklahoman*, and the *Tulsa World*.

A second public notice was published in the *Daily Oklahoman*, and the *Tulsa World* on July 14, 2004 and in the *Pawnee Chief* on July 21, 2004. On July 16, 2004, letters were sent to appropriate governmental entities seeking input on the assertion of authority in the Pawnee Nation’s TAS application. Comments on this second notice were received from the following:

- Oklahoma Corporation Commission from Ben Jackson, General Counsel;
- Indian Health Service from Dale Keel, Acting Area Director;
- Oklahoma Office of the Secretary of Environment (OSE) from Miles Tolbert, Secretary of the Environment;
- OWRB (transmitted by OSE letter) from Duane A. Smith, Executive Director;
- Senator James Inhofe, including a letter from Senator Inhofe to David Walker, Comptroller General of the United States;
- Oklahoma Department of Environmental Quality (transmitted by OSE letter) from Steven A. Thompson, Executive Director;
- Oklahoma Department of Mines from Tekleab Tsegay, Chief, Technical Services;
- Cherokee Nation of Oklahoma from Chadwick Smith, Principal Chief;
- Muscogee (Creek) Nation from A.D. Ellis, Principal Chief;
- St. Regis Mohawk Tribe from Chief Margaret Terrance, Chief Barbara Lazore, and Chief James Ransom;
- Eastern Shawnee Tribe of Oklahoma from Charles Enyart, Chief;
- BIA response from Michael R. Smith, Regional Director;
- Seneca-Cayuga Tribe of Oklahoma from LeRoy Howard, Chief;
- National Tribal Environmental Council (NTEC) from David F. Conrad, Executive Director;

- OWRB transmittal of public comments from Derek Smithee, including:
  - Environmental Federation of Oklahoma, Inc. from James R. Barnett, President and General Counsel;
  - Oklahoma Municipal League, Inc. from Danny George, Executive Director;
  - Oklahoma Independent Petroleum Association (OIPA) from Angie Burckhalter, Director of Regulatory Affairs; and
  - Oklahoma Farm Bureau & Affiliated Companies from Marla R. Peek, Director of Regulatory Affairs.

All comments were considered in making a determination on the TAS application. Significant comments are discussed below.

### **Comments and Responses from 1998 Notice**

*Comment 1A:* The Indian Health Service and the Natural Resources Conservation Service each sent letters in support of the Pawnee Nation's water quality program. Both agencies deferred to the Pawnee Nation and the BIA for issues on land status.

*Response 1A:* EPA appreciates the support of the Indian Health Service and the Natural Resources Conservation Service on CWA programs.

*Comment 2A:* The Oklahoma Corporation Commission suggested that the Pawnee Nation refrain from developing its own water quality program due to complicated jurisdictional issues and recommended that the Tribe work with the state agencies and other groups to address water quality issues. The Oklahoma Corporation Commission also noted that the state agencies welcome input from tribal governments on programs such as water quality standards, monitoring, and nonpoint source pollution.

*Response 2A:* EPA appreciates the Oklahoma Corporation Commission's response. EPA acknowledges that tribal jurisdictional issues in Oklahoma are complex and strongly supports cooperation between neighboring jurisdictions. EPA's Indian Policy, established in 1984, supports the development of tribal environmental programs. EPA also recognizes that state agencies such as the Office of the Secretary of Environment, the OWRB and the Oklahoma Conservation Commission solicit input from tribal governments on water quality programs. The 1984 policy also states that EPA encourages cooperation among states, Indian Tribes and local governments on environmental issues. We understand that the State and the Tribe have engaged in discussions regarding a framework to coordinate water quality standards.

*Comment 3A:* The Kaw Nation stated that it had no lands adjacent to those represented on the color map labeled as "Exhibit 4" (tribal lands in Pawnee and Payne Counties) and therefore did not dispute the Pawnee Nation's jurisdiction on these lands. The Kaw Nation agreed that five Tribes - the Kaw Nation, the Otoe-Missouria Tribe of Oklahoma, the Pawnee Nation, the Ponca Tribe of Indians of Oklahoma and the Tonkawa Tribe of Indians of Oklahoma - each hold one-



fifth interest in the Chilocco Campus as shown in “Attachment A” of the Tribe’s application. Lastly, the Kaw Nation did not challenge the general claim of the boundary between Kaw and Pawnee Nation lands at Chilocco, but did not attest to the accuracy of the map labeled Attachment A.

*Response 3A:* EPA appreciates the Kaw Nation’s response. EPA’s approval of the Pawnee Nation’s request for program authorization for CWA §303(c) and §401 does not include the Chilocco Campus. This approval action does include the Pawnee Nation’s tract of 823.56 acres at Chilocco. If a dispute on the boundary between the Kaw Nation’s lands and the Pawnee Nation’s lands at Chilocco arises as a result of a water quality issue, EPA will solicit further advice from the BIA. The description in the Decision Document of the Pawnee Nation’s lands at Chilocco was obtained from the BIA’s Land Index Report.

*Comment 4A:* The Oklahoma Conservation Commission stated its support of the Pawnee Nation’s effort to develop water quality standards. The Conservation Commission also noted the growth of tribal environmental offices and complimented the Pawnee Nation on its programs. Finally, the Conservation Commission indicated the benefits of state, tribal and federal cooperation.

*Response 4A:* EPA appreciates the Oklahoma Conservation Commission’s support of tribal water quality programs and looks forward to continuing work with state and tribal agencies on water quality programs.

*Comment 5A:* The U.S. Fish and Wildlife Service commented on the difficulty of implementing water quality regulations on small portions of water bodies and noted that application of different regulations may be confusing to the regulated community. The Service also commented that EPA’s approval of the Pawnee Nation’s authority to issue §401 certification will have no adverse effect on listed or proposed threatened or endangered species, but individual actions may require consultation under §7 of the Endangered Species Act. The U.S. Fish and Wildlife Service indicated that it would review water quality standards proposed by the Pawnee Nation.

*Response 5A:* EPA will continue to work with all parties to implement water quality standards in a consistent manner. EPA will consult with the Fish and Wildlife Service under the Endangered Species Act (ESA) regarding approval of the Pawnee Nation’s water quality standards to the extent that approval of those standards may affect listed, threatened or endangered species or critical habitat. Issuance of §401 certification by the Pawnee Nation (or a state) is not subject to consultation under the ESA; however, the federal agency issuing a permit which requires §401 certification (such as an NPDES permit or a §404 permit) is responsible for fulfilling any applicable requirements of the ESA.

EPA would like to make one clarification. The Service’s letter stated “any water quality standards proposed by the Pawnee Nation must be at least as protective as the state standards.” State and tribal standards must be as protective as the minimum requirements of the CWA and

the implementing regulations. State and tribal standards must also consider the downstream uses of neighboring jurisdictions, but do not have to be identical (see 40 CFR §131.10(b)). Thus, if the State of Oklahoma has adopted a water quality standard that is more stringent than federal requirements, the Pawnee Nation must take into consideration Oklahoma's standard and ensure that the tribal standard provides for the attainment and maintenance of the standard applicable to the downstream state waters and otherwise meets the minimum federal requirements.

### **Comments and Responses from the 2004 Notice**

*Comment 1B:* The Oklahoma Corporation Commission (“OCC”) “objects to the Pawnee Nation’s effort to use TAS under CWA as a means to gain TAS under SDWA.” The OCC explains in a footnote that this comment is based on uncertainty over whether the Pawnee Nation is asserting authority over the underground injection control (UIC) program of the Safe Drinking Water Act (SDWA). The footnote cites the Pawnee Nation Tribal Environmental Regulatory Act of 1997, included in the submittal, as an assertion of authority over UIC activities.

*Response 1B:* The application is limited to the authority of the Pawnee Nation to establish water quality standards under §303 of the CWA and for certification authority under §401 of the CWA. The transmittal letter from the Pawnee Nation President as well as the resolution from the Pawnee Nation Business Council indicate that this application is limited to those specific CWA programs. EPA is not approving TAS for the Pawnee Nation under any other statutes or for any other provisions of the CWA in this decision.<sup>1</sup>

*Comment 2B:* OCC, the Oklahoma Municipal League and the Environmental Federation of Oklahoma comment that it is unfeasible to allow separate tribal water quality standards in Oklahoma due to the history of allotments and the lack of “reservations” in the State. Senator James Inhofe also expressed concern about granting TAS in Oklahoma due to the absence of formal reservations. ODEQ and OWRB commented that the ruling in Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991) is limited to sovereign immunity as related to state taxes.

*Response 2B:* In a final rule dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that “it is the status and use of the land that determines if it is to be considered ‘within a reservation’ rather than the label attached to it.” 56 Fed. Reg. at 64881. As a result, Tribes without formal reservation areas may be treated as states for land held in trust by the United States for the Tribe. EPA’s position is based on long-standing Supreme Court case law, including Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991), and cases cited therein. Though the controversy in that case was centered around applicability of state taxes in Indian country, the Court’s finding is not limited to taxation and is consistent with general principals of federal Indian law.

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<sup>1</sup>EPA has previously approved TAS for the Pawnee Nation for purposes of funding eligibility under §106 of the CWA.



*Comment 3B:* OCC, OIPA, Senator Inhofe and the Oklahoma Farm Bureau each commented that EPA should not approve TAS for Tribes in Oklahoma because of the complexity in determining which lands are tribal trust lands and because Indian country in Oklahoma varies over time. The Oklahoma Water Resources Board (OWRB) and the Oklahoma Department of Environmental Quality (ODEQ) assert that the legal descriptions of four parcels are inadequate. OWRB added that there appear to be inconsistencies between the map and the legal descriptions of three parcels.

*Response 3B:* Records of all lands held in trust by the United States for a specific Tribe are maintained by the BIA. In comments on the Pawnee Nation application, the Superintendent of the BIA's Pawnee Agency provided legal descriptions of the lands held in trust for the Tribe as well as a list of lands that were no longer in trust. The Chief of the Trust Services Branch also provided a printout of trust lands, though this contains both tribal trust lands and member allotments. As to the trust lands at issue in this decision, BIA commented that the legal descriptions in the record are correct. Quarter, section, township and range make up an adequate legal description. That these descriptions are sufficient to determine location is evinced by ODEQ's own comment that the four parcels over which they express concern are tribal cemeteries. Finally, where there is a conflict between maps provided by the Pawnee Nation and the BIA legal descriptions, the BIA legal descriptions control under EPA's decision.

*Comment 4B:* ODEQ asserts that four of the parcels identified as tribal trust lands have no waters that flow through or touch upon them.

*Response 4B:* EPA agrees that there don't appear to be any streams, lakes or potential waters on the following four areas of tribal trust land. EPA notes that if there are in fact no existing or potential surface waters on these lands, EPA expects the Pawnee Nation WQS submission would not include standards for these areas.

- 10 acres in the SW quarter (SE part) of Section 16, Township 19N, Range 5E Indian Meridian (Payne County);
- 10 acres in the SW quarter (SW part) of Section 18, Township 21N, Range 5E Indian Meridian (Pawnee County);
- 10 acres in the SW quarter (SE part) of Section 20, Township 22N, Range 5E Indian Meridian (Pawnee County);
- 10 acres in the NE quarter (SW part) of Section 32, Township 22N, Range 4E Indian Meridian (Pawnee County).

*Comment 5B:* ODEQ, OWRB and the BIA each commented on the lack of quality of the maps provided by Pawnee Nation. The comments are that the maps lack sufficient clarity, detail and scale.

*Response 5B:* It is somewhat difficult to identify the various tribal trust lands from the maps. However, legal descriptions for nine parcels of tribal trust land provided by BIA were available to the public for the most recent public comment period. These legal descriptions are sufficient

to determine the lands on which any EPA-approved Pawnee Nation water quality standards would apply.

*Comment 6B:* ODEQ asserts that surface waters for which the Pawnee Nation will be establishing standards are not identified.

*Response 6B:* Some water bodies are not named because they do not have formal names. The known water bodies and associated tribal trust lands are as follows:

- 366.03 acres in the NE quarter (all parts), NW quarter (NE and SE parts), SW quarter (NE and SE parts), and SE quarter (all parts) of Section 32, Township 22N, Range 5E Indian Meridian (Pawnee County) - Black Bear Creek and unnamed tributary (sometimes called Possum Creek);
- 320 acres in the NW quarter (all parts) and SW quarter (all parts) of Section 33, Township 22N, Range 5E Indian Meridian (Pawnee County)- Black Bear Creek and unnamed tributary;
- 240 acres located in the NE quarter (NE and SE parts) and the SE quarter (all parts) of Section 22, Township 29N, Range 2E Indian Meridian (Kay County) - Chilocco Creek and three unnamed tributaries to Chilocco Creek;
- 180 acres located in the SW quarter (all parts), SE quarter (SW part), and NW quarter (SW part) of Section 23, Township 29N, Range 2E Indian Meridian (Kay County) - unnamed tributary to Chilocco Creek;
- 403.56 acres in the NE quarter (NW and SW parts), NW quarter (all parts), SW quarter (all parts), and SE quarter (NW and SW parts) of Section 26, Township 29N, Range 2E Indian Meridian (Kay County) - three unnamed tributaries to Chilocco Creek.

This TAS approval covers riparian wetlands associated with Black Bear Creek, Chilocco Creek and the unnamed tributaries on any of the identified tribal trust lands. As discussed above under Response 4B, there are four areas of tribal trust lands included in this approval which do not have known surface waters.

*Comment 7B:* ODEQ and OWRB point out that the most recent public notice indicates that Pawnee Nation is not seeking TAS over allotments, but the TAS application does request authority over member allotments.

*Response 7B:* This comment is correct. Through clerical error, the most recent public notice was incorrect in stating that Pawnee does not seek TAS over member allotments. However, for the reasons discussed in the Decision Document, EPA is not approving the Pawnee Nation for member allotments.

*Comment 8B:* OCC and OIPA commented that, in Oklahoma, the trust status of the land changes rather frequently as land is placed into trust or loses its trust status. This creates a moving target in terms of jurisdiction. The OCC comment also references the “complexity and scope of Indian land identification and location of any and all lands that may be affected by TAS status.” OWRB commented that the Pawnee Nation must prove the trust status of all parcels for which EPA is granting TAS.

*Response 8B:* Lands held in trust for Tribes do not lose their trust status as frequently as this comment suggests. Member allotments change more frequently, but EPA is not approving TAS for Pawnee Nation member allotments. The BIA maintains records on trust lands, and is the proper agency for determining the trust status of lands. BIA provided EPA with a list of tribal trust lands and, in their comments to the recent public notices, verified that the parcels identified are held in trust for the Pawnee Nation.

*Comment 9B:* OCC comments: “The Pawnee Tribe cannot claim a sovereign right to protect the public health, safety and welfare of a general tribal population or a defined geographical province, unlike the nations and tribes in other cases in controversy, where there is a definite tribal enclave where legitimate claims of public health and safety can be observed.” The commenter, citing the 1981 Supreme Court test for civil authority over non-member activities within a reservation in Montana v. U.S., 450 U.S. 544, indicates that because the Pawnee Nation does not have formal reservation boundaries, they have no sovereign authority to protect tribal members on tribal trust lands. OCC also comments that the Pawnee Nation does not meet the statutory criteria for TAS because establishment of water quality standards is not necessary to prevent a serious and substantial effect on the health and welfare of the Tribe, citing the factors from the Montana test and from EPA’s regulations regarding tribal jurisdiction over nonmember activities within a reservation. They comment that the standards are not necessary because their sampling of the waters which run through Pawnee Nation lands indicate they are not impaired.

*Response 9B:* As was stated in response 2B, in a final rule dated December 12, 1991 (56 Federal Register (“Fed. Reg.”) 64876-64896), EPA indicated that the geographic scope of the tribal eligibility under the CWA includes lands held in trust for a Tribe.

This comment confuses the Supreme Court test for civil authority over nonmembers with the statutory requirements for TAS. In order for a Tribe to have civil authority over non-member activities, the test in Montana must be met. However, the Pawnee Nation is not seeking regulatory authority over non-members on fee lands, and we are aware of no non-member activities on the trust lands at issue in this decision that affect water quality. In addition, EPA and not the Tribe is the permitting authority responsible for implementing any approved Pawnee Nation water quality standards.

Impairments to water quality, whether from oil and gas exploration and production or otherwise, are not a prerequisite to establishment of water quality standards or this TAS decision. Section 518(e) and EPA’s implementing regulations establish four criteria for TAS. First, the applicant

must be a federally-recognized Tribe exercising governmental authority over an Indian reservation. Second, the Tribe must have a governing body carrying out substantial governmental duties and powers. Third, the powers to be exercised must pertain to water resources held by a Tribe, by the United States in trust for Indians or held by an Indian subject to a restriction on alienation, or otherwise within the borders of an Indian reservation, and over which the Tribe can demonstrate authority. Fourth, the Tribe must be reasonably expected to be capable of carrying out the functions for which TAS is sought.

*Comment 10B:* The Muscogee Creek Nation commented that individual Indian allotments are excluded from state regulation citing Colville Confederated Tribes v. Walton, 647 F.2d 42 (9<sup>th</sup> Cir. 1981). The Muscogee Creek Nation comments that EPA's interpretation of the CWA excludes Tribes from obtaining TAS for non-reservation Indian country is contrary to the EPA Indian Policy. This Tribe states that such a position is contrary to federal Indian law principles, and that restricted and trust allotments are subject to tribal and federal control to the exclusion of state regulation, citing Indian Country U.S.A. Inc. v. State of Oklahoma, 829 F.2d 967, 976 (10<sup>th</sup> cir. 1987).

*Response 10B:* As noted in the decision document, EPA has not treated allotments outside of formal reservations as within the scope of CWA §518(e), and the Pawnee Nation has not demonstrated as a legal matter that the allotments covered by its application fall within the scope of that section. The language in §518(e)(2) limits tribal eligibility to those areas "otherwise within the borders of an Indian reservation." Section 518(h) defines an "Indian tribe" as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." Because of the specific language in the CWA, EPA may only approve tribal programs for reservations. Under the case law, reservations include formally designated reservations and lands held in trust by the United States for a Tribe. *E.g.*, United States v. John, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), Indian Country U.S.A. v. State of Oklahoma, 829 F. 2d 967 (10<sup>th</sup> Cir. 1987) *cert. denied* by Oklahoma Tax Com'n v. Muscogee (Creek) Nation, 487 U.S. 1218 (1988), Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991), Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) *reh'g denied* 509 U.S. 933 (1993).

For comments 11B through 22B, it should be noted that 40 CFR §131.8(c)(3) specifically states that "(c)omments shall be limited to the Tribe's assertion of authority." We are responding even though these comments do not directly relate to the Pawnee Nation's assertion of authority.

*Comment 11B:* OCC states that should Pawnee Nation's standards be revised in the future such that they are significantly different from state standards, the different standards would cause confusion for permit applicants as well as creating difficulties for enforcement and water quality planning entities. The Oklahoma Municipal League, OIPA, Senator Inhofe and the Environmental Federation of Oklahoma expressed similar concerns, commenting that if each



Tribe in Oklahoma established separate or even contradictory standards, the result would significantly burden the regulated community and restrict the State's economic growth. These commenters, citing City of Albuquerque v. Browner, 97 F.3d 415 (10<sup>th</sup> cir. 1996) cert denied 522 U.S. 965 (1997), assert that there could be significant economic burdens resulting from a Tribe setting standards significantly more stringent than the state standards.

*Response 11B:* The water quality standards currently being discussed by the Pawnee Nation are very similar to the state standards, and thus the concern that the Pawnee Nation will adopt very different standards from the state standards seems premature or speculative; however, we acknowledge that the Tribe might some day decide to change those standards, just as the State might change its existing standards. To date, the Pawnee Nation is the only Oklahoma Tribe to have submitted a TAS request for water quality standards.

It is important to note that today's action of approving TAS for the purpose of establishing water quality standards does not constitute approval of any particular standards. EPA has yet to act on specific standards developed by the Pawnee Nation. Further, any new or future changes in state or tribal water quality standards would have to come to EPA for approval before taking effect under the CWA. Where the proposed change in water quality standards is consistent with the other sovereign's standards, none of the implementation issues raised by commenters would arise, and review is likely to be relatively simple and uncomplicated. In the event that the state or a Tribe proposes changes in water quality standards that would result in inconsistencies with adverse impacts like those of concern to the commenters, the Agency would, as it has done in practice, take such inconsistencies into consideration.

EPA is also prepared to help facilitate appropriate discussions with the Pawnee Nation and the State of Oklahoma towards the establishment of state and tribal standards that are mutually compatible and supportive wherever possible. Further, where states and Tribes face difficulties in resolving their differences regarding water quality standards for shared waters, pursuant to CWA §518(e), EPA has established a dispute resolution process that can be initiated by states or Tribes where one government's water quality standards would lead to unreasonable consequences for the other government. See 40 CFR §131.7.

*Comment 12B:* OCC commented that the Pawnee Nation lacks the funding to implement TAS under the CWA. Senator Inhofe, referencing OCC comments, expressed this same concern. ODEQ commented that capability may have changed since the application was submitted and should be updated.

*Response 12B:* Section II. D. of the Decision Document details EPA's determination regarding capability of the Pawnee Nation to implement the water quality standards and 401 certification programs. The Pawnee Nation is eligible for funding under a number of EPA grant programs, including the CWA grant program. This funding was adequate for the development of draft water quality standards and EPA has no evidence to indicate insufficient funds for any necessary revisions. Nor does EPA have any indication that the Pawnee Nation has insufficient means for

carrying out the certifications under §401 of the CWA. The authority for all other CWA implementation, such as issuance and enforcement of permits in Pawnee Nation Indian country, is being retained by EPA. As a result, resources beyond what the Pawnee Nation has shown are not necessary at this time. Should the Pawnee Nation seek other regulatory programs, a review of necessary resources is part of the requisite capability demonstration. In further support of the position that the Pawnee Nation has the capability to implement the water quality standards program, it should be noted that the Pawnee Nation is implementing a water quality monitoring program for assessment of physical, chemical, and biological parameters.

*Comment 13B:* Comments from the ODEQ, OWRB, OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma all objected to a grant of TAS due to the “checkerboard” nature of Indian country in Oklahoma. They assert that approval of water quality standards for non-contiguous tracts results in numerous, potentially conflicting, permit requirements from a variety of governmental entities.

*Response 13B:* EPA is prepared to help facilitate appropriate discussions with the Pawnee Nation and the State of Oklahoma towards the establishment of tribal and state standards that are mutually compatible and supportive wherever possible.

*Comment 14B:* OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma each expressed the concern that tribal standards in this area would be duplicative. In the words of the OCC: “In Oklahoma, the general public health, safety and welfare of individual American Indian property owners and tribal trust lands are protected by the existing state-based water quality standards.” ODEQ provided similar comments.

*Response 14B:* Because EPA has not approved Oklahoma's water quality standards for Indian country in Oklahoma, under the CWA the state water quality standards are not applicable on tribal trust lands such as are the subject of this action.

*Comment 15B:* OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma assert that Pawnee Nation's application for TAS for the purposes of establishing water quality standards “represents an unnecessary attempt to duplicate existing environmental programs and an unnecessary bureaucratic layer.” ODEQ commented similarly that approval of TAS enables the development of potentially inconsistent, overlapping and redundant standards and programs.

*Response 15B:* As stated in the previous response, the Oklahoma water quality standards do not apply in tribal trust lands under the CWA. Water quality standards adopted by the Pawnee Nation and approved by EPA would not duplicate any CWA programs that currently exist for these waters. As noted above, permit writers must make sure that permits contain any limits necessary to ensure consistency with downstream standards. Further, the authority to establish water quality standards “is in accord with powers inherent in Indian tribal sovereignty.” City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir.1996)(cert. denied 522 U.S. 965 (1997)). As noted above, EPA is prepared to help facilitate appropriate discussions with the Pawnee

Nation and the State of Oklahoma towards the establishment of tribal and state standards that are mutually compatible and supportive wherever possible

*Comment 16B:* Approval of TAS under the CWA makes it easier to obtain Safe Drinking Water Act programs, leading to an adverse impact on oil and gas producers and the OCC.

*Response 16B:* Under EPA's "simplification rule," 59 Fed. Reg. 64339 (December 14, 1994), there is a reduced burden on Tribes in obtaining TAS if the Tribe has TAS under another statute or program. For example, a Tribe with TAS for one program would not need to provide further information in a subsequent TAS application to demonstrate that it is a federally-recognized Tribe with a governing body carrying out substantial duties and powers. However, Tribes must show authority to implement each program, jurisdiction over the areas allowed by each statute (assuming a regulatory program is what is being sought) and capability to implement that program. Approval of TAS for one program is by no means an automatic approval for a different program. Because the underground injection control program of the SDWA is not at issue in this action and the Pawnee Nation has made no indication of an intent to seek TAS for SDWA programs, it is premature to address the Tribe's ability to obtain TAS for those programs.

*Comment 17B:* OIPA, the Environmental Federation of Oklahoma and the Farm Bureau each state that approval of the Pawnee Nation's TAS application should be delayed until completion of the report by the General Accounting Office (GAO) requested by Senator James Inhofe in a letter to the Comptroller General of the United States dated June 1, 2004. In a letter to Regional Administrator Richard Greene dated June 3, 2004, Senator Inhofe also requested EPA postpone program authorizations until this report can be issued.

*Response 17B:* The Pawnee Nation's application for TAS to develop water quality standards was submitted in 1998. EPA is aware of Senator Inhofe's request to GAO. However, EPA believes it has an obligation to issue a decision on this TAS application.

*Comment 18B:* ODEQ comments that the Pawnee Nation did not support certain assertions made regarding water quality in the Arkansas River and Black Bear Creek.

*Response 18B:* These assertions by the Pawnee Nation are not necessary to EPA's evaluation of the Tribe's TAS application. As stated in a previous response, the CWA does not require a demonstration of water quality impairment for the Pawnee Nation to receive TAS. Therefore, no such documentation is necessary.

*Comment 19B:* ODEQ commented that the Pawnee Nation has requested TAS for §401 certification authority, yet does not have approved water quality standards in place. The comment asks what standards the Pawnee Nation would use for certification.

*Response 19B:* EPA is granting the request for the Pawnee Nation to be treated in a manner similar to a state with regard to CWA §401 certification authority. Ultimately, the Pawnee



Nation will certify to Tribal water quality standards when they are adopted by the Tribe, and approved by EPA.

*Comment 20B:* ODEQ commented at length about EPA's capability to implement environmental programs on member-held allotments throughout Oklahoma and attached additional materials regarding the State's opinion of authority over allotments under the CWA. The Cherokee Nation and the Muscogee Creek Nation also commented regarding EPA's lack of resources.

*Response 20B:* These comments are outside the scope of this TAS decision. EPA is granting TAS to the Pawnee Nation for tribal trust lands only. EPA's authority over allotments is not at issue here. Regardless, EPA will continue to make every effort to fulfill our responsibilities to implement environmental laws.

*Comment 21B:* The Cherokee Nation, the Muscogee Creek Nation, the Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, NTEC and the Saint Regis Mohawk Tribe commented in support of approval of the Pawnee Nation TAS. The Saint Regis Mohawk Tribe asserts that the Pawnee Nation submitted an application that meets all CWA requirements and that "there is no legal reason to further delay approval" of the application. The Tribal commenters assert that Tribes have inherent authority as sovereign governments and TAS authorization is a means of exercising that authority.

*Response 21B:* We agree that EPA should proceed with a decision regarding the Pawnee Nation TAS application.

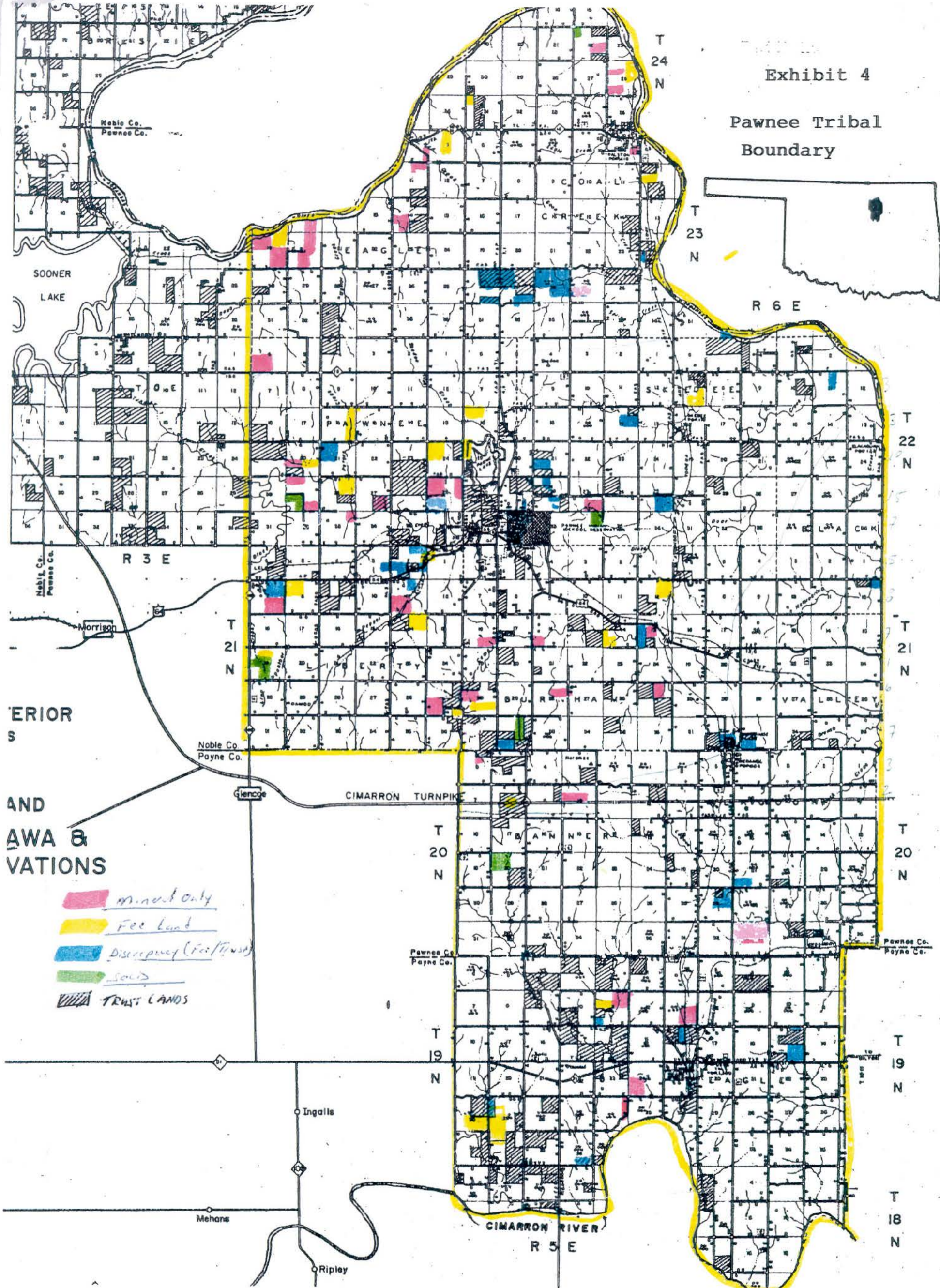
*Comment 22B:* The Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, NTEC and the Saint Regis Mohawk Tribe point out that, in the context of implementation of the CWA, "states have often established differing standards, usually without unreasonable consequences." These commenters acknowledged that in the few instances where there is a conflict, federal courts decide the issues, citing to the case of Arkansas v. Oklahoma, 503 U.S. 91 (1992). They further commented that Congress affirmed the "fundamental right of both tribal and state sovereigns to set standards to protect their citizens" and that it is appropriate for EPA to have a conflict resolution mechanism to "resolve serious differences if and when they might arise." Several Tribes point out that this mechanism has not been needed because tribal standards are usually consistent with state standards.

*Response 22B:* The dispute resolution mechanism mentioned in these comments has a statutory basis in §518(e) of the CWA. EPA has promulgated regulations concerning this process at 40 CFR §131.7.



Exhibit 4

Pawnee Tribal Boundary



ERIOR  
S

AND  
AWA &  
VATIONS

-  *m. out only*
-  *Fee Land*
-  *Discrepancy (Fee/Trust)*
-  *SOLD*
-  *TRUST LANDS*



